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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STANLEY BOCLAIR and JOEL T. PELZ,

Appellants,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants respectfully submit this memorandum in opposition to the State's motion to dismiss or affirm.

1. In its spurious attempt to show that this case does not present a substantial federal question (*see* M.D. 10, 18),[1] the State misstates the record in at least four separate and significant respects. First, the State misleads the Court by asserting, both in the text of its motion and in

[1] "M.D." refers to the State's motion to dismiss or affirm filed in this Court. "J.S." and "J.S. App." refer to the jurisdictional statement and the appendix annexed thereto. "Tr." refers to portions of proceedings before the trial court that are a part of the record on appeal. "R." refers to the common law record. "Def. Br." refers to the brief filed by appellants in the Illinois Supreme Court.

its restatement of the questions presented, that the interview notes involved in this case are "verbatim" statements. (M.D. i, 10.) No court below made any such finding, and the State's assertion is simply untrue. A "verbatim" statement is one in the speaker's "exact words; word for word." *Webster's Ninth New Collegiate Dictionary* 1309 (1986). The notes involved here are not verbatim statements under Webster's, or anyone else's, definition. The interviews ranged from 30 minutes to three and one-half hours in duration, and the notes for each witness interview range from approximately 15 to 300 words.[2] The decision as to what should be included, and what should be excluded, was in each case dictated by the thought processes and strategies of the defense, and none of the notes were reviewed or signed by any of the witnesses. (Tr. 80.) *Cf. Palermo v. United States*, 360 U.S. 343, 355 n.12 (1959) (agent's 600-word summary of conference lasting three and one-half hours "clearly not a verbatim narrative" and thus not subject to production under Jencks Act).

Second, the State asserts (M.D. 11) that the court below approved *pretrial* discovery limited to "impeachment" materials—truly a logical impossibility before any trial testimony was heard. Moreover, the terms of the trial court's order were not limited to impeachment materials (R. 31), and the Illinois Supreme Court made clear (J.S. App. 5) that an additional purpose of this pretrial discovery was to guide the State in restructuring and perfecting its case against the defendant.

Third, the State contends (M.D. 17) that the ruling below does not interfere with counsel's Sixth Amendment duty to prepare the defense because *all* of the defense

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[2] The interview notes are part of the record on appeal. (R. 30.)

notes must either be consistent or inconsistent with the statements given to the State. The State's contention is illogical because it assumes: (1) that the State interviewed all of the 200 persons it designated as potential trial witnesses, and (2) that the only questions asked by the defense team were questions that the State also asked. Those assumptions are contrary both to general human experience and to the historical facts of this case. The defense asked numerous questions concerning subjects that were particularly relevant to its theory of the case, but were not explored at all by the State. By naming over 200 potential witnesses (J.S. 7), and then seeking to obtain the notes pertaining to all State "witnesses" interviewed by the defense team (while knowing that it intended to call fewer than 20 witnesses at trial), the State sought to force the defendant to assist in the preparation of the case against him. Indeed, the State did little more than identify the field to be harvested, and then placed on the defendant both the burden of separating the wheat from the chaff and the burden of delivering the wheat to the prosecution. Under the Constitution, those burdens simply cannot be placed on the defendant.

Finally, the State contends (M.D. 17) that the decision below is "fair" because it allows "reciprocal" discovery. One well might question whether a rule of "reciprocity" has any place in our criminal adversary system,[3] but that

[3] The State's reciprocity argument misconceives the different roles played by prosecuting and defense counsel. Defense counsel owes his undivided loyalty to his client, and, consistent with ethical obligations, should "serve as the accused's counselor with courage [and] devotion." American Bar Association Standards for Criminal Justice 4-1.1(b) (1980). In contrast, the government's interest " 'is not that it shall win a case, but that justice shall be done.' " *Young v. United States ex rel. Vuitton Et Fils S.A.*, ____ U.S. ____, ____, 107 S. Ct. 2124, 2135 (1987) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)).

question is of no moment here because the State sought discovery far in excess of that which was sought (or legally obtainable) by the defense. Under a "reciprocal" discovery principle, the State would have been entitled to discover statements made by *defense* witnesses.[4] What the State demanded were notes taken during defense interviews with *State* witnesses. The Illinois Supreme Court's broad, virtually unlimited expansion of discovery goes far beyond reciprocity and violates due process.

2. The State also misstates the case decisions which it cites (M.D. 11-14) in support of the decision below. In *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), this Court recognized that disclosure of an attorney's memoranda would necessarily reveal the attorney's strategies, legal theories, and mental impressions, thereby creating unfairness, subverting confidence in the judicial system, and demoralizing the profession. The instant case epitomizes the dangers which led this Court to establish the work product doctrine in *Hickman*.

Similarly, *United States v. Nobles*, 422 U.S. 225 (1975), provides no support for the wholesale discovery ordered in this case. *Nobles* does not even address the issue of *pretrial* discovery, which is the only matter at issue here. Instead, *Nobles* holds that the State—even at trial—is entitled only to limited discovery of an investigator's notes, *if and when* the investigator takes the stand. *Id.* at 239. Appellants have consistently and repeatedly expressed their willingness to follow the *Nobles* procedure, but the

[4] Illinois Supreme Court Rule 413(d)(i) allows the State to discover defense witness statements. The courts below all agreed that the State's request went beyond the scope of Rule 413(d)(i). (J.S. App. 11, 17.)

State consistently and repeatedly has refused to be bound by it. (J.S. 21-22.)

The State's reliance (M.D. 12-14) on *Jencks v. United States*, 353 U.S. 657 (1957), and *Goldberg v. United States*, 425 U.S. 94 (1976), is also misplaced. Both cases (unlike the case at bar) pertain to production *at trial*, not *before trial*. In addition, they both address the duties of the prosecutor, not the fundamentally different obligations of defense counsel. *See* page 3, note 3, *supra*. Moreover, the Jencks Act, 18 U.S.C. § 3500 (1982), which Congress passed in the wake of the *Jencks* case, and which was the controlling law in *Goldberg*, allows discovery of governmental witness statements only after the witness has testified at trial, and, even then, requires production only of impeachment materials.

No prior decision of this Court approves the kind of expansive, pretrial disclosure that has been ordered in this case. Given the constitutional infirmities of any such compelled disclosure, there is little wonder that no such precedent exists.[5]

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[5] In an attempt to bolster its argument, the State even relies upon a California case which has been overruled, a fact which appellants pointed out when the State relied on it below. (*See* Def. Br. 36-37 n.18.) The case is *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), which the State cites for the proposition that "the defense in a criminal case has no valid interest in pretrial concealment of relevant information from the prosecution." (M.D. 11.) The California Supreme Court limited *Jones* to its facts in *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), and fully discredited it in *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981), and *In re Misener*, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985). Since the State's continued, intentional reliance on overruled precedent speaks for itself, we offer no further comment.

3. Finally, the State fails to address several of appellants' central arguments. First, the State does not deny that the decision below conflicts with this Court's decision in *Wardius v. Oregon*, 412 U.S. 470 (1973). (*See* J.S. 14, 23-24.) The State simply ignores *Wardius*. Second, the State does not deny that the decision below conflicts with *State v. Williams*, 80 N.J. 472, 404 A.2d 34 (1979). (*See* J.S. 13-14, 26-28.) Again, the State simply ignores the decision. By doing so, the State effectively concedes the existence of a substantial federal question which requires plenary review by this Court.

It is respectfully submitted that the motion to dismiss or affirm should be denied and that probable jurisdiction should be noted.

Respectfully submitted,

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